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THE INVESTMENT OPPORTUNITY IN MASS INCARCERATION: A BLACK (CORRECTIONS) OR BROWN (IMMIGRATION) PLAY?

GEIZA VARGAS-VARGAS*

There's been 133 nations identified crossing that border. Not just Mexicans, not just Hondurans, not just El Salvadorans, but 133 nations. Many of those are nations of interest, which means that they either harbor, aid and abet, or are somehow connected to terrorist activities And yet they continue to cross that border. We've got prayer rugs that have been found down there, other things that have been found down there—and yet they [the federal government] continue to do nothing.

—Arizona State Senator Russell Pierce, primary sponsor of S.B. 1070, and whose state senate seat was recalled in the November 2011 elections.¹

Asked if the private companies usually get to write model bills for the legislators, [an ALEC insider] said, 'Yeah, that's the way it's set up. It's a public-private partnership. We believe both sides, businesses and lawmakers should be at the same table, together.'

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1. Beau Hodai, *Corporate Con Game: How the Private Prison Industry Helped Shape Arizona's Anti-Immigrant Law*, IN THESE TIMES (June 21, 2010), http://www.inthesetimes.com/print/corporate_con_game. Arizona Governor Jan Brewer signed S.B. 1070, also known as the Support Our Law Enforcement and Safe Neighborhoods Act, into law in April 2010, and it became effective as of July 29, 2010. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). In the November 2011 elections, Senator Pearce's seat was recalled. See also Marc Lacey & Katharine Q. Seelye, *Recall Election Claims Arizona Anti-Immigration Champion*, N.Y. TIMES (Nov. 10, 2011), <http://www.nytimes.com/2011/11/10/us/politics/russell-pearce-arizonas-anti-immigration-champion-is-recalled.html?pagewanted=all>.

—From Laura Sullivan’s *National Public Radio* report, *Prison Economics Help Drive Arizona Immigration Law*.²

About seven years ago, the *Western New England Law Review* published my article on what I deemed (and still deem) to be the long-term joint venture between the United States government and private prison corporations to incarcerate our population of black men. In my article, *White Investment in Black Bondage* (WIBB),³ I examined the disclosure documents of the largest publicly traded corporations, as well as statistical reports by the Bureau of Prisons and Department of Justice, to arrive at a very clear conclusion. The disclosure documents of the private prison corporation, as well as the government’s historical statistics and future projections, together pointed to one thing: there was an actual, concerted effort to incarcerate and make profit from black bodies. There was no question in my mind that the federal and state governments played a concrete role as the sole clients of the private prison corporation.

In 2008, UCLA professor Alexander Volokh published an article in the *Stanford Law Review* entitled, *Privatization and the Law and Economics of Political Advocacy*.⁴ Volokh cited my article along with others, which he called a “small sample of the literature,” in opposition to prison privatization.⁵ Professor Volokh evaluated a narrow angle on the anti-prison privatization argument, and purported to explain via economic methodology why prison firms do not (and more importantly would not want to) advocate, or lobby, for stricter incarceration laws. Volokh argued against the position that privatization would result in an “increase in the size of the market,”⁶

2. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NAT’L PUB. RADIO (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>; *Who Really Writes States’ Legislation?*, NAT’L PUB. RADIO (July 21, 2011), <http://www.npr.org/2011/07/21/138537515/how-alec-shapes-state-politics-behind-the-scenes>.

3. Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENGL. L. REV. 41 (2005).

4. Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008).

5. *Id.* at 1202 n.31 (citing various sources).

6. *Id.* at 1197. *See generally id.* at 1207-16.

or “distort” criminal law.⁷ He argued that such a position carried no weight primarily because notwithstanding privatization, the public sector has always had agents, namely corrections officers’ unions, lobbying for pro-incarceration policy. Therefore, it would not be cost-effective for private prisons to spend earnings to do the same, *nor* were they doing the same.⁸ Volokh also concluded via economic modeling that privatization did not create a more dynamic incarceration market. Instead, Professor Volokh argued that a rather an interesting phenomenon occurred: a decrease in lobbying activities. Ultimately, however, his conclusion was that evidence showing that the impact of the private prison firm on the criminal justice system was “ambiguous” at best.⁹ Effectively, according to Volokh, there was no “smoking gun” to show what prison activists and legal scholars claimed. This smoking gun argument was very clever. Notwithstanding the lack of transparency in lobbying activity, for Volokh, if you cannot prove it, it does not exist.

The topic that I introduced as a law student and that Professor Volokh wrote about three years ago is now known as “mass incarceration.” Several scholars are focused on this issue,¹⁰ and Michelle Alexander’s book, *The New Jim Crow*,¹¹ legitimizes it. It is real now, at least for legal scholars.¹² And for the public, it is real because of immigration “reform.”

7. *Id.* at 1197-98, 1205.

8. *Id.* at 1197.

9. *See id.* at 1205; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

10. I attended the panel entitled, “Reconceptualizing Wealth in the Evaluation of Global and Domestic Critiques of Equality” with Colin Crawford, André Douglas Pond Cummings, Atiba R. Ellis, and Andrea Freeman. I was unable to attend the panel “Race, Gender, and Criminality,” but most certainly mass incarceration was addressed in that panel as well. I also attended a work-in-progress that discussed the “kids for cash” case against Judge Mark Ciavarella, Jr., convicted of taking bribes from prison builders, and the impact on mass incarceration on incarcerated youth. In addition, throughout the weekend there was much discussion about *The New Jim Crow*.

11. *See* ALEXANDER, *supra* note 9.

12. For more information regarding how issue has always been real for scholars and activists, *see* Volokh, *supra* note 4, at 1202 n.30; Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY (Dec. 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial->

Prior to LatCrit XVI, I was not aware of *The New Jim Crow*, as the years between WIBB and now were occupied with my legal work on Wall Street—mergers and acquisitions and hybrid collateralized debt obligations, credit default swaps, total return swaps, the structuring of complex financial instruments, those things that brought the house down in 2007. In my work as a lawyer for my firm's Wall Street clients, there was little energy or time to contemplate the ills of the world, as mine grew narrower and narrower, always focused on the almighty billable hour. I never stopped thinking or feeling, and the various panels at LatCrit inspired me to complete my thoughts on the matter.¹³ For many reasons, including that (i) I am Latina and not a black male, and (ii) I was a deal lawyer and not a criminal lawyer, I will never be the authority on the issue. But, at one point in time (and still), I was a little voice in the field of flowers. The purpose of this article is to fill what I perceived to be a gap in the scholarly discussion on mass incarceration. The end of this article considers why there was a gap. I delve into a phenomenon that became even more obvious to me: the black/Latino divide.

PRISON STOCK

Publicly traded corporations exist because there is demand for the particular investment offered by that corporation.¹⁴ In other words, people buy and sell stock in corporations that build and operate private prisons (and service every aspect of the prison system) because people want to own that kind of stock. By people, I mean individuals and institutions or funds. If such demand did not exist, there would be

complex/4669/; *The Sentencing Project Home*, SENT'G PROJECT, www.sentencingproject.org (last visited Feb. 27, 2012). In terms of legal scholars, I would argue the issue is now mainstream.

13. Shortly after Volokh's piece was accepted for publication, I began writing a response, one that I never completed. I abandoned the project because I could not find anything beyond common sense to counter his very clever and strategically written position. At the time ALEC was indeed a very private organization. It was only in 2011 that ALEC model legislation was leaked outside the organization membership. See John Nichols, *ALEC Exposed*, THE NATION (July 12, 2011), <http://www.thenation.com/article/161978/alec-exposed>.

14. See *Going Public: How Initial Public Offerings Work*, YAHOO! FINANCE, http://finance.yahoo.com/education/stocks/article/101019/Going_Public_How_Initia l_Public_Offerings_Work (last visited Mar. 1, 2012).

no such thing, no business reason (compelling or not) to seek financing from the public market. Thus, publicly traded prison corporations exist because there is a strong market for prison stock. More clearly stated, there is a strong market for the product that the prison firm supplies.

There is no question that investment demand for incarceration exists, and around 2007 that demand evolved to include immigration detention.¹⁵ Detention is what we call being incarcerated, or held, for the crime of entering the United States illegally.¹⁶ Detention is the purgatory of the undocumented immigrant, or as is commonly known to the American masses, the illegal alien. Detention is a new source of income for investors, albeit a risky one, and there is a reason for this. Publicly traded corporations are pressured to demonstrate growth in income or earnings quarter after quarter, and including an immigration play is a source of such growth.¹⁷ This is not to suggest a shift in corporate policy, but an expansion in growth strategies. When a corporation depends on one client for its cash flow, and therefore its profits or earnings, the financial success of that corporation as measured by Wall Street analysts and the market is wholly determined by its client's policies.¹⁸ In the case of the private prison corporation, that client is the U.S. federal or state government.¹⁹ There are many private, non-publicly traded companies that service or operate prisons through intergovernmental service agreements.²⁰ My focus, however, is on publicly traded corporations because of the greater transparency of information. Public corporations are required to file disclosure documents with the Securities Exchange Commission (the SEC) on a

15. For an example, see *Texans Demand Wells Fargo Stop Investing in Detention Camps*, NAT'L PRISON DIVESTMENT CAMPAIGN (Feb. 27, 2012), <https://prisondivestment.wordpress.com/2012/02/27/wells-fargo-actions-in-texas/>.

16. See *Detention*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/detention> (last visited Mar. 1, 2012).

17. See *Going Public: How Initial Public Offerings Work*, *supra* note 14.

18. See, e.g., *Seven Things that Determine the Value of a Business*, BUS. DEV. SOLUTIONS, http://www.bizacquisition.com/Value_of_a_Business.html (last visited Mar. 29, 2012).

19. See *The Perverse Incentives of Private Prisons*, THE ECONOMIST (Aug. 24, 2010), www.economist.com/blogs/democracyinamerica/2010/08/private_prisons.

20. See CORR. CORP. OF AM., <http://www.cca.com/> (last visited Mar. 30, 2012).

quarterly and annual basis, or whenever the company experiences a material change. Private companies are not regulated this way, and therefore have no disclosure requirements. Their contracts and business activities are generally private.

An example of such information transparency is the Corrections Corporation of America's (CCA) annual reports. CCA is the largest publicly traded prison corporation in the United States. In its 2011 annual report, CCA noted that its revenues heavily depend on contracts with federal agencies, including U.S. Immigration and Customs Enforcement (ICE):

We currently derive, and expect to continue to derive, a significant portion of our revenues from a limited number of governmental agencies. The loss of, or a significant decrease in, business from the BOP, ICE, USMS, or various state agencies could seriously harm our financial condition and results of operations. The three primary federal governmental agencies with correctional and detention responsibilities, the BOP, ICE, and USMS, accounted for 43% of our total revenues for the fiscal year ended December 31, 2011 (\$749.3 million). . . . Although the revenue generated from each of these agencies is derived from numerous management contracts, the loss of one or more of such contracts could have a material adverse impact in our financial condition and results of operations. We expect to continue to depend upon the federal agencies and a relatively small group of other governmental customers for a significant percentage of our revenues.²¹

CCA, which is headquartered in Tennessee, is one of the two dominant players in the prison industry. The Geo Group (GEO), the other dominant player and also publicly traded corporation, is headquartered in Florida. CCA, formerly known as Prison Realty Trust, issued its first initial public offering (IPO) in July 1997. Known by its ticker symbol CXW, CCA was the first to dive into third-party corrections, ironically in the area of immigration detention. While the firm has been generally profitable, it has also experienced many setbacks related to experiments with structure, management, and strategy to competitively position the company. GEO, formerly Wackenhut Corrections, issued its IPO in July 1994. Both companies

21. Corr. Corp. of Am., Annual Report (Form 10-K) 28 (Feb. 27, 2012).

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employed the real estate investment trust structure (REIT), separating the management and operation of prisons from the ownership and management of the real estate. The REIT structure was popular in the late 1990s because it allowed real estate companies to capitalize off of tax treatment that effectively reduced corporate income tax exposure when eighty percent of earnings were distributed to shareholders. Eventually, this business structure proved limiting in the quest for growth, and both companies restructured into non-REIT C-Corps.

The private prison industry is unique and continues to evolve. Most tout prison stock as highly attractive; however, the reality is that the sector goes through regular growing pains. I believe this has largely to do with the limited source of income. All contracts are government contracts. However, prison stock is somewhat opportunistic as the source of its profit evolves.²² The corporation that is best positioned will capitalize off of the constant change.

The current source of profit for prisons, and the source of growth for the criminal justice system, is the war on drugs.²³ The rate of

22. CCA's historical stock prices, for example, are characterized by constant and regular stock splits. Stock splits allow managers of a corporation to manipulate stock price. When the price of stock gets too high, and the margin of growth decreases, the managers will recommend a stock split. For example, on September 13, 2006 CCA did a 3 for 2, which decreased its stock price from \$67.89 per share closing price to \$44.33 per share closing on the following day. See *Dividends and Stock Splits*, CORRECTIONS CORP. OF AM., <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-dividends> (last visited Mar. 6, 2012); *Stock Quote and Chart*, CORRECTIONS CORP. OF AM., <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-stockquote> (last visited Mar. 6, 2012). Stock priced at \$44 per share will reflect greater growth than stock priced at \$67 and close to a ceiling. Similarly, corporations engage in reverse stock splits to manipulate a low stock price into a higher one. CCA engaged in a reverse stock split early on in its history. Manipulations of stock price allow managers to better align what they believe is the intrinsic value of a corporation with the extrinsic value reflected in the stock price. See generally *Reverse Stock Splits*, U.S. SEC. & EXCHANGE COMM'N (Nov. 3, 2000), <http://www.sec.gov/answers/reversesplit.htm>.

23. Professors Jerry Reiman and Paul Leighton invite their readers to look at the criminal justice system as if it were aimed at keeping a large population in courts and prisons consisting of primarily poor people, rather than as a system protecting citizens from crime. JERRY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (2009).

The criminal justice system, and certainly its joint venture with the private section via contracts with the private prison companies, has an interest in demonizing/criminalizing a population so citizens are distracted from those

incarceration of blacks and brown people as a result of drug possession has reached its optimal state. In other words, there is no growth potential in this area. Prison companies cannot justify building new prisons on the basis of drug convictions. However, prison companies *can* justify the building of new prisons based on a whole new kind of prisoner: the illegal alien, and more specifically, the “Mexican.”²⁴

In my opinion, the company best positioned to serve the federal agency Immigrations and Customs Enforcement (ICE) will enjoy significant and steady growth. Thus, prison corporations have a real interest in any and all legislation that increases the number of bodies that go through the detention or incarceration process. Growth in the criminal population translates into returns for shareholders. Therefore, anti-immigration policy both at the state and federal level is the next frontier in the incarceration of black and brown bodies. While mass incarceration remains as the bread and butter, growth in that area is limited. It is the detention center as prison, and not the incarceration facility, that will be a boon to the publicly traded prison corporation.²⁵

committing far more serious crimes—think of unfair wages, environmental destruction, exploitation of children and workers, unsafe working conditions, theft of billions of retirement dollars, and on and on—than drug trafficking and possession. We have entered a phase in American politics, legislation, and capitalism in which the brown immigrant fits the bill.

24. Regardless of actual ethnicity, it seems that all Spanish-speaking undocumented immigrants are Mexican. Whether I have been in Brooklyn, New York, or Charleston, South Carolina, most identify Latino day-workers or service-workers as Mexican, when in reality many are not Mexican but from Ecuador, Colombia, and Peru. See Brentin Mock, *Immigration Backlash: Hate Crimes Against Latinos Flourish*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2007/winter/immigration-backlash> (last visited Feb. 29, 2012). In the outtakes to a film I watched recently, I was caught off guard at the unnecessary comment made by a crotchety, old woman: “God loves all colors. Except Mexican.” JUNO (Fox Searchlight Pictures 2007).

25. See Stephanie Chen, *Larger Inmate Population is Boon to Private Prisons*, WALL ST. J. (Nov. 19, 2008), <http://online.wsj.com/article/SB122705334657739263.html> (explaining that prison companies are preparing for a wave of new business as the economic downturn makes it increasingly difficult for federal and state government officials to build and operate their own jails). I believe the reason there are not more private prison contracts is because these firms have yet to totally prove themselves to the government. Though the government is probably ready to hand over the system to a third party, I think it will do so gradually, as the private managers improve or perfect their operations. That said, current American culture is

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According to the Global Detention Project, an interdisciplinary research project out of Switzerland, the United States “maintains the largest detention infrastructure in the world.”²⁶ This comes as no surprise because the United States has the largest prison population, and is also one of the few countries that still imposes a death penalty.²⁷ In addition,

[a]side from ‘criminal aliens,’ those confined in U.S. immigration detention centres include undocumented immigrants, unaccompanied minors, and asylum seekers. These detainees are held in a panoply of types of detention sites, including dedicated immigrant detention centres, privately run prisons, federal penitentiaries, state and county jails, juvenile detention centres, and semi-secure shelters run by private charities to house unaccompanied minors.²⁸

However, in many states, there are no separate detention centers, and undocumented immigrants awaiting removal or asylum are held in prisons. During the summer after my first year of law school, I interned with the Political Asylum & Immigration Representation Project, a 501(c)(3) organization out of Boston, Massachusetts. I worked with the detention center initiative, which was tasked with visiting detainees and informing them of their legal rights. I spent the summer going to state and federal prisons in Massachusetts. Detainees, regardless of reason for deportation or whether they are waiting for asylum, look like prisoners. They wear the prison one-

less outraged by the idea of building detention facilities to hold illegal “aliens” than the idea of using taxpayer money to finance the building of prisons. Furthermore, the Department of Homeland Security’s budget is exploding.

26. *United States Detention Profile*, GLOBAL DET. PROJECT (Mar. 2009), <http://www.globaldetentionproject.org/de/countries/americas/united-states/introduction.html>.

27. *Id.*

28. *Id.* The Global Detention Project (GDP) is an inter-disciplinary research endeavor that investigates the role detention plays in states’ responses to global migration, with a special focus on the policies and physical infrastructures of detention. The project is based at the Graduate Institute’s Programme for the Study of Global Migration, and receives financial support from Zennstrom Philanthropies and the Swiss Network for International Studies. *Aims, Origin, Staff*, GLOBAL DET. PROJECT, <http://www.globaldetentionproject.org/about/about-the-project.html> (last visited Feb. 20, 2010).

piece. They sleep in prison cells with a toilet in it. They eat when told to eat, and they socialize when told to socialize, just like criminals. And now with the anti-immigrations statutes, most will be criminals: the new criminal.

S.B. 1070 BREATHING WHILE BROWN & ALEC

The legislation that has created a new market for prison companies is the Arizona anti-immigration statute S.B. 1070,²⁹ the Support our Law Enforcement and Safe Neighborhoods Act, which was signed by Governor Brewer in April 2010.³⁰ Similar statutes have made their way across the United States, but only five states, including my current state, South Carolina, have enacted such laws.³¹

Senator Russell Pearce, who was recalled from his Arizona Senate seat in the November 2011 elections,³² introduced S.B. 1070 to the Arizona senate. However, prior to introducing the statute, Senator Pearce shared his draft legislation with the American Legislative Exchange Council (ALEC).³³ In other words, Senator Pearce had an

29. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

30. S.B. 1070 does not operate alone: there is the immigration law on trespass, S.B. 1159, 49th Leg., 1st Reg. Sess. (Ariz. 2009); statute on citizenship S.B. 1309, 50th Leg., 1st Reg. Sess. (Ariz. 2011); and an English-only law, S.B. 1409, 50th Leg., 1st Reg. Sess. (Ariz. 2011). See *infra* note 44 for the People for the American Way Foundation's side-by-side comparison of the above-referenced Arizona legislation.

31. See S.B. 20, 119th Leg., Gen. Assem. (S.C. 2011). See *State and Local Initiatives*, NAT'L COUNCIL OF LA RAZA, http://www.nclr.org/index.php/issues_and_programs/immigration/state_local_immigration_initiatives/ (last visited Feb. 27, 2012), for list of state and local legislation based on S.B. 1070 that has been passed or rejected, or is still under debate.

32. Lacey & Seelye, *supra* note 1; see also Ben Tobias, *Arizona Senator Recalled over ALEC Immigration Bill*, PRWATCH.ORG (Nov. 9, 2011), <http://www.prwatch.org/news/2011/11/11120/arizona-senator-recalled-over-alec-immigration-bill>.

33. American Legislative Exchange Council (ALEC) is "[a] nonpartisan membership association for conservative state lawmakers who shared a common belief in limited government, free markets, federalism, and individual liberty." *History*, ALEC, <http://www.alec.org/about-alec/history/> (last visited Feb. 29, 2012). The organization's corporate members pay dues of \$7,000 to \$25,000, plus additional \$2,500 to \$10,000 to be on a task force. ALEC, PRIVATE SECTOR MEMBERSHIP (2011), available at <http://alec.org/tempwebpage.com/wp-content/>

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idea for anti-immigration policy, and he took it to ALEC to refine before introducing it to the Arizona state Legislature.³⁴ ALEC subsequently tweaked the policy, and Senator Pearce's Arizona immigration statute became the model statute for other states.

ALEC is a 501(c)(3) nonprofit organization and in its membership brochure describes itself in part as follows:

With nearly 2,000 members, ALEC is the nation's largest nonpartisan, individual membership association of state legislators. ALEC is one of America's most dynamic public-private partnerships with nearly 300 corporate and private foundation members. ALEC provides its public and private sector members with a unique opportunity to work together to develop policies and programs that effectively promote the Jeffersonian principles of free markets, limited government, federalism, and individual liberty.³⁵

In his 2008 article, Professor Volokh mentions ALEC, which he describes as having "hazy . . . innerworkings."³⁶ Of private prison firms, Volokh writes:

Their political advocacy – which is extensive – mainly takes the forms of contributions to politicians and participation in the American Legislative Exchange Council (a conservative organization that drafts model legislation), though they also testify before Congress and present arguments in the popular press. But, while it is clear that these firms advocate privatization, it is unclear that they advocate incarceration to any significant extent.³⁷

In retrospect, I find great irony in Professor Volokh's mention of ALEC, because it seemed to me that Volokh's intent in raising the issue of ALEC was purposeful and strategic. To me, his idea was to

uploads/2011_privateSector_brochure.pdf. Legislative members pay \$200 dues for two-year terms and \$400 for four-year terms.

34. See Lacey & Seelye, *supra* note 1; Sullivan, *supra* note 2.

35. See ALEC, LEGISLATIVE MEMBERSHIP APPLICATION (2011), available at http://alec.org.tempwebpage.com/wp-content/uploads/2011_legislative_brochure.pdf.

36. Volokh, *supra* note 4, at 1229.

37. *Id.* at 1226.

not hide ALEC's relationship with the prison companies, but by coming out with the existing relationship, Volokh at once minimized the significance of such relationship. In essence, raising the issue of ALEC was a means to distract by creating an appearance of transparency:

The inner workings of ALEC are hazy, and indeed, some commentators argue that the private prison industry expressly seeks out channels that are 'conveniently out of public view' and 'behind closed doors' to promote its pro-incarceration agenda. The trouble with this view is that we can also presume that prison firms work within ALEC on privatization issues: Prison privatization is one of the "major issues" of the very same Criminal Justice Task Force; the Task Force has a Subcommittee on Private Prisons and has a model 'Housing Out-of-State Prisoners in a Private Prison Act'; and CCA is known to have talked to the Task Force on the subject. *Therefore, this, too, is "soft" evidence; we do not know that they also work on sentencing or incarceration issues. Indeed, CCA asserts that it has not participated in, voted on, or endorsed any stand on model legislation for sentencing or crime policies within ALEC.*³⁸

In 2008, when Volokh's article was published, ALEC was indeed a non-transparent organization. However, the organization's degree of influence and actual conduct has been recently exposed³⁹ as the organization at the forefront of conservative Tea Party-esque legislation.⁴⁰ The Center for Media and Democracy, *National Public*

38. *Id.* at 1229-30 (emphasis added). Professor Volokh indicates that both CCA and the GEO group are members of ALEC. Volokh also indicates Sodexo Marriot is "a major CCA stockholder" and a "prominent corporate funder . . . of ALEC." *Id.* at 1229. One reason I am hesitant about Volokh's piece is the audacity of his claims, which I read and re-read in stupor. It is as if he expects the reader to accept his position as truth because economic modeling supports his position. In my opinion, common sense strikes away at his economic model. All lawyers and legal scholars know smoking guns are not necessary to convict in court, and "soft evidence" is evidence nonetheless. Perhaps it is because, as a person of color and one who did not grow up privileged, I know that things do happen behind closed doors, in secret.

39. Multiple progressive or radical online news outlets have exposed the organization, notably Beau Hodai's (founder of *DBA Press*) reporting and on the mainstream side *National Public Radio* and *The Nation*. See Hodai, *supra* note 1.

40. Such legislation includes statutes with an anti-immigration agenda, calling

Radio, and *The Nation* have been instrumental in exposing the “hazy innerworkings” of ALEC. Together these three organizations, along with smaller outlets, have exposed the role that corporations have in the drafting and introduction of model legislation across the United States as members of ALEC. Discussing ALEC, the Center for Media and Democracy tells us, and I doubt that Volokh would disagree:

ALEC is not a lobby; it is not a front group. It is much more powerful than that. Through ALEC, behind closed doors, corporations hand state legislators the changes to the law they desire that directly benefit their bottom line. Along with legislators, corporations have membership in ALEC. Corporations sit on all nine ALEC task forces and vote with legislators to approve “model” bills. They have their own corporate governing board which meets jointly with the legislative board. (ALEC says that corporations do not vote on the board.) Corporations fund almost all of ALEC’s operations. Participating legislators, overwhelmingly conservative Republicans, then bring those proposals home and introduce them in statehouses across the land as their own brilliant ideas and important public policy innovations—without disclosing that corporations crafted and voted on the bills. ALEC boasts that it has over 1,000 of these bills introduced by legislative members every year, with one in every five of them enacted into law. ALEC describes itself as a ‘unique,’ ‘unparalleled’ and ‘unmatched’ organization.⁴¹

In his July 2011 piece *ALEC Exposed*, John Nichols of *The Nation* writes:

The details of ALEC’s model bills have been available only to the group’s 2,000 legislative and 300 corporate members. But thanks to

for increased prison privatization, and quite recently, anti-woman’s health personhood statutes. ALEC has drafted model legislation most recently for anti-immigrant measures; prison privatization; voter suppression (voter ID legislation); and measures that attack health care, environmental regulation and workers rights. See *id.*; John Nichols, *ALEC Exposed*, THE NATION (July 12, 2011), <http://www.thenation.com/article/161978/alec-exposed>; *ALEC’s Firm Hold on the Arizona Legislature*, PEOPLE FOR THE AM. WAY, <http://www.pfaw.org/press-releases/2011/11/alec’s-firm-hold-arizona-legislature> (last visited Feb. 18, 2012).

41. ‘ALEC’ Has Been Forced to REAR ITS UGLY HEAD at Last!, DAILEY KOS (Apr. 22, 2012), <http://www.dailykos.com/story/2012/04/22/1085541/--ALEC-Has-Been-Forced-To-REAR-ITS-UGLY-HEAD-At-Last->.

a leak to Aliya Rahman, an Ohio-based activist who helped organize protests at ALEC's Spring Task Force meeting in Cincinnati, The Nation has obtained more than 800 documents representing decades of model legislation. Teaming up with the Center for Media and Democracy, The Nation asked policy experts to analyze this never-before-seen archive.⁴²

One of the policy groups that analyzed ALEC documentation is the People for the American Way Foundation (PFAW), an organization dedicated to advocacy for equal rights, freedom of speech, religious liberty, and equal justice for all.⁴³ PFAW issued a report in 2011, in which it compared Arizona's immigration legislation with the ALEC model statutes. The report also lists the affiliation that members who introduced or sponsored the bill have with ALEC, as well as the corporations that fund ALEC. I find the literal side-by-side comparison of the various Arizona immigration statutes and their ALEC model counterparts to be most compelling.⁴⁴ The statutes are virtually identical.

In his paper, Volokh asserted that the interest of prison corporations in lobbying for greater incarceration was speculative.⁴⁵ The findings and comparisons of PFAW remove any credibility from that statement; I would even go on to say that one does not need a study or report to conclude the same. Prison corporations most certainly have an interest in any laws that increase incarceration. Legislation that creates new crimes, or increases sentences for existing crimes, has immediate impact on the bottom line of government contracts: more criminals mean more government demand for prison facilities. Some would go a step further to argue that it is the

42. Nichols, *supra* note 40.

43. *ALEC IN ARIZONA: The Voice of Corporate Special Interests in the Halls of Arizona's Legislature*, PEOPLE FOR THE AM. WAY (2011), <http://www.pfaw.org/media-center/publications/alec-arizona-voice-corporate-special-interests-halls-arizonas-legislature>.

44. *See id.* All legislators involved with S.B. 1070 are members of ALEC. PFAW also does a side-by-side comparison of Arizona prison legislation and its ALEC counterpart. The 100-page report also compares Arizona statutes and ALEC model codes, voter ID laws, anti-union legislation, campaign financing, and privatization of public services including education, health care reform, virtual schools, and anti-environment regulation.

45. *See* Volokh, *supra* note 4, at 1226.

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corporation's duty to have an interest in such legislation, as it is the duty of those managing the corporation to maximize shareholder profits.

The strategy shift, or more correctly stated, the return in strategy to immigration detention is ironic, as CCA, the first private prison corporation in the United States, focused its initial business model on the same. CCA's first facility was a small detention center in Houston, Texas.⁴⁶ CCA currently owns the largest detention center in the United States: the T. Don Hutto Residential Center, located just outside of Austin in Taylor, Texas.⁴⁷ From 2006 to 2009, the facility held undocumented female immigrants and their children.⁴⁸ A reported sexual assault at the facility, now exclusively a detention center for undocumented females awaiting removal, has brought the problem of sexual violence at immigration detention centers to the forefront.⁴⁹

The investment opportunity in immigration corrections is handed to prison firms on a silver platter, or as Sarabi and Bender state, the

46. The Houston Processing Center opened in 1984. *See A Quarter Century of Service to America*, CORR. CORP. OF AM., <http://www.cca.com/about/cca-history/> (last visited May 4, 2012).

47. This detention facility is essentially undistinguishable from a prison. *T. Don Hutto Residential Center*, DETENTION WATCH NETWORK (Nov. 5, 2008), <http://www.detentionwatchnetwork.org/tndonhutto>.

48. *See T. Don Hutto: Women in Detention*, T. DON HUTTO, <http://tdonhutto.blogspot.com/> (last visited Mar. 4, 2012). The blog has not been updated since August 21, 2010, when a corrections officer wrote a posting on an arrest regarding the sexual assault of a detainee. The blog states that it is "dedicated to providing information about Hutto and women's detention issues." *Id.*

49. Sexual assaults at immigration detention centers within corrections facilities are a problem recognized by ICE, which disclosed information about a corrections officer's assault of a woman held in detention. *See Editorial, A Broken, Dangerous System*, N.Y. TIMES (Dec. 4, 2011), <http://www.nytimes.com/2011/12/05/opinion/a-broken-dangerous-system.html> ("A recent American Civil Liberties Union report, based on documents obtained through the Freedom of Information Act, uncovered almost 200 accusations of sexual abuse of immigrant detainees."); *Desperate Need for Oversight as Sexual Assault is Carried Out in Immigration Detention*, RESTORE FAIRNESS, <http://restorefairness.org/tag/t-don-hutto-detention-facility/> (last visited Mar. 5, 2012). *See Blog of Rights*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/blog/tag/Prison%20Rape%20Elimination%20Act> (last visited Mar. 5, 2012) for information regarding the exclusion of immigration detention centers in the Prison Rape Elimination Act passed in 2003.

private prison market is a “ready made market.”⁵⁰ Prison companies capitalize off of (i) government inefficiencies, both at the state and federal levels; (ii) a corrections population that has had non-stop, documented growth, and for which continued growth is forecasted; (iii) a capital market receptive to prison securities; and (iv) incentives to build, including public finance and tax incentives. And with more and more states enacting anti-immigration statutes,⁵¹ the market for profit in prisons/detention centers with the state and federal governments as the sole client is ready-made. The problem of corporations directly influencing criminal law and policy for their benefit is profoundly related to a business and legal culture in which we give the corporation more rights as “legal persons” than human beings have as “natural persons.”

LATCRIT XVI

In reflecting on what was a phenomenal three days of intellectual thought, I found a disconnect between the agenda of the Latino and the agenda of the Black scholar. In regards to mass incarceration, I believe the prison scholar cannot ignore or discredit the role that immigration plays in filling U.S. prisons. When I wrote WIBB, I did not separately consider the Latino male prison population, and it is important to state this decision was not a choice. Considering Latinos in my paper made it messy, primarily because the government statistics on Latinos is inconsistent or even absent. Some reports separate us out. Others include us as part of the black population. The avoidance of difference speaks volumes—the Other is the Other regardless of blackness or brownness.⁵² In other words, to the Self, if you are not white, you are black, no different. And yet we, the Other, fight and fight and fight each other because of our differences.

While it may complicate the dialogue, I believe a discussion of mass incarceration is incomplete, and possibly even without efficacy, if the immigration dynamic is ignored. There is no question that brown bodies are serving as another very real and profound source for

50. See Volokh, *supra* note 4.

51. E.g., H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 20, 119th Leg., Gen. Assem. (S.C. 2011).

52. See EDWARD SAID, ORIENTALISM (1979).

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mass incarceration, and such incarceration is legally sanctioned via this notion of immigration reform.

I took a look at Professor Alexander's text, *The New Jim Crow*, and was disappointed that the mass internment of undocumented immigrants in the United States is not addressed. This may have been intentional—again, because I recognize that discussion of more than one racially oppressed group can muddy the waters—but certainly not intentional in a hurtful or dismissive way. That said, I often wonder if to blacks, Latinos are invisible, as blacks are to whites, such that we do not even enter the black consciousness.

This leads me to an observation I made at the conference in San Diego. While LatCrit—the organization, the conference, the body—has maintained an inclusive stance, I experienced a sense of separation, most visibly to me at the Saturday morning plenary on the Latino/a Academy. There were no blacks on the panel, and the discussion was not about black scholars or administrators. The discussion was actually about us. Looking around the room, LatCrit's black scholars were notably absent, and I was at once confused but not confused, and perhaps disappointed. As an adult, I have studied and know more about black history and experience than about Puerto Rico, or the history and experience of Latinos in the United States. Ask me to name a black feminist and more than one name rolls off my tongue—bell hooks, Assata Shakur, and Audre Lorde. Ask me to name a Latina or Puerto Rican feminist and I have to dig deep and think about whom I may have read; the names do not roll off my tongue.

While I have no statistical proof or evidence of the following, I believe knowing more about black history and experience is common among Latino scholars, though the reverse may not be true. I have yet to meet a black scholar that knows more about Latino history and experience in the U.S., or even have an equal level of knowledge to that of his or her own people. This is not to come down on my black colleagues, but to point out a reality—there is a perceived hierarchy of oppression that does a disservice to us all. For blacks, mostly the black experience matters. Hence, the light treatment if any on the impact of immigration on mass incarceration.

I do not deny the wretched treatment of blacks in the United States and the history of violence and subordination. As previously stated, I know more about black history than of my own people and

their historical and current oppression. But the undocumented immigrant who sacrifices his or her life to cross the border to find work in the United States, the “illegal alien” as the white politicians like to say, are a lower class citizen. As compared to the illegal alien, the African American and those of us with U.S. citizenship are privileged. The anti-immigration climate stems from the same power trip, prejudice, and the fear of dark skin that has empowered whites to subordinate blacks, and originally, to subordinate the Native American. The individual that is anti-immigrant is also anti-brown, anti-black, anti-Asian, anti-gay, anti-woman. And in the context of mass incarceration, the Latino condition, the immigration play completes the narrative of oppression.